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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FOUR

THE PEOPLE, Plaintiff and Respondent, v. CHARLES JESS WALANTUS, Defendant and Appellant.	B230302 (Los Angeles County Super. Ct. No. PA064857)

APPEAL from a judgment of the Superior Court of Los Angeles County, Harvey Giss, Judge. Affirmed in part; reversed in part and remanded.

Carol S. Boyk, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Lance E. Winters, Senior Assistant Attorney General, Daniel C. Chang and Robert C. Schneider, Deputy Attorneys General, for Plaintiff and Respondent.

The jury convicted defendant Charles Jess Walantus of three counts arising from a single incident: (1) commercial burglary (Pen. Code, § 459) (count 2); (2) petty theft with a prior (§ 666) (count 3); and (3) second degree robbery (§ 211) (count 4).[1] The trial court imposed a second strike sentence of 11 years.[2]

In this appeal from the judgment, defendant contends: (1) the evidence was insufficient to support his conviction of robbery; (2) the trial court had a duty to instruct sua sponte on attempted robbery; (3) the trial court prejudicially erred in giving CALCRIM No. 361; and (4) because theft is a lesser included offense of robbery, the theft conviction must be reversed because he cannot be convicted of both robbery and theft for the same offense. We reject all but the last contention and conclude that the theft conviction must be reversed. The judgment, as modified, is affirmed.

BACKGROUND

On June 12, 2009, Danny Almada, the manager of an Albertson's grocery store, saw defendant place four bottles of liquor in a hand basket and leave the store without paying for them. Almada followed defendant outside to his car and repeatedly told him to drop the basket. Defendant entered the driver's side of his car and placed the basket on the front passenger's seat. Almada blocked the car door from closing and leaned into the car to retrieve the basket of liquor. As Almada reached over defendant's lap for the basket, defendant began elbowing and pushing him away while trying to start the car. Almada testified that during this struggle, which left red marks on his neck and chest, his

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[1] All further undesignated statutory references are to the Penal Code.
The prosecution dismissed an additional count of attempted robbery (§§ 211, 664) (count 1) after the defense rested.

[2] The court imposed the midterm of three years on count 4, the base term, which it doubled to six years as a result of defendant's prior strike, and a consecutive five-year enhancement for the prior serious felony conviction. (§§ 213, subd. (a)(2); 1170.12, subd. (c)(1); 667, subd. (a)(1).) The court imposed three-year sentences on counts 2 and 3, which were stayed under section 654.

feet were outside the car door and he was "really scared" that defendant would start the car and drag him with it.

Two Albertson employees, Jacob Briggs and Robert Patterson, arrived to assist Almada. Briggs "entered the passenger side and removed the liquor" while Almada was "trying to get the keys away before [defendant] could start the car." Patterson reached in behind Almada and pulled defendant from the car. Patterson and Briggs held defendant on the ground until he quit struggling. The police arrived a short while later and arrested him.

DISCUSSION

I. The Evidence of Force Was Sufficient to Support the Robbery Conviction

"Robbery is the felonious taking of personal property in the possession of another, from his person or immediate presence, and against his will, accomplished by means of force or fear." (§ 211.) The jury found that by leaving the store with unpaid merchandise, defendant committed a petty theft, which became a robbery when force or fear was employed to resist Almada's efforts to reclaim the stolen property. (See *People v. Estes* (1983) 147 Cal.App.3d 23, 28-29 [robbery conviction affirmed based on force used to resist the security guard's attempts to retake the stolen property].)

Defendant contends that the evidence was insufficient to support the jury's finding that force or fear was used to retain the stolen property. The contention lacks merit.

A. Standard of Review

"When assessing a challenge to the sufficiency of the evidence, we apply the substantial evidence standard of review, under which we view the evidence in the light most favorable to the judgment and determine whether any rational trier of fact could have found the essential elements of the charged crime or allegation proven beyond a reasonable doubt. (*Jackson v. Virginia* (1979) 443 U.S. 307, 319; *People v. Johnson* (1980) 26 Cal.3d 557, 578.) Stated differently, 'the court must review the whole record

in the light most favorable to the judgment below to determine whether it discloses substantial evidence—that is, evidence which is reasonable, credible, and of solid value—such that a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt.' (*People v. Johnson*, *supra*, 26 Cal.3d at p. 578.)" (*People v. Morehead* (2011) 191 Cal.App.4th 765, 777-778 (*Morehead*).)

B. Evidence of Force

Defendant argues that because "the evidence did not show *when* the bottles were removed from the car, there was no proof that appellant tried to retain them by force or fear, as *Estes* requires." (Italics added.)

The record does not support defendant's contention. Contrary to his assertion that the record was silent as to when the bottles were removed from the car, Almada testified they were present when the struggle began: "As I attempted to grab the basket, he began to waiver [*sic*] his arms and struggle and kind of elbow me and push." Based on Almada's testimony, a reasonable jury could conclude beyond a reasonable doubt that force was used against Almada *before* the stolen items were retrieved from the car.

C. Evidence of Fear

In light of our determination that the finding of force was supported by substantial evidence, we need not address defendant's contention that Almada's fear of being dragged by the car was objectively unreasonable. The contention, in any event, lacks merit. *Morehead*, *supra*, 191 Cal.App.4th 765, which defendant cites for the proposition that "fear" as used in the definition of robbery must be both actual and reasonable, did not decide that issue because it was not preserved for appellate review. Without deciding whether a robbery victim's fear must be objectively reasonable, the court found there was substantial evidence of actual and reasonable fear in that case.

Similarly, without determining whether "fear" as used in the definition of robbery must be both actual and reasonable, we conclude the evidence was sufficient to support a finding of actual and reasonable fear in this case. Based on Almada's testimony that he

was lying across defendant's lap with his legs hanging out the open car door, the jury could find that defendant's attempts to start the car would create a reasonable fear of being dragged by the car.

Defendant argues that such fear was unreasonable given his testimony that he could not start the car because "he had dropped the ignition key." However, a rational jury could have rejected defendant's testimony as self-serving and not credible. "Conflicts and even testimony which is subject to justifiable suspicion do not justify the reversal of a judgment, for it is the exclusive province of the trial judge or jury to determine the credibility of a witness and the truth or falsity of the facts upon which a determination depends. [Citation.] We resolve neither credibility issues nor evidentiary conflicts; we look for substantial evidence. [Citation.]" (*People v. Maury* (2003) 30 Cal.4th 342, 403.) The evidence was sufficient to support a finding of actual and reasonable fear.

II. The Trial Court Had No Sua Sponte Duty to Instruct on Attempted Robbery

Defendant contends that because the evidence supported a finding of an attempted robbery but not a completed robbery, the trial court had a sua sponte duty to instruct on attempted robbery. We disagree.

A trial court has a sua sponte duty "'to instruct fully on all lesser necessarily included offenses supported by the evidence.' (*People v. Breverman* (1998) 19 Cal.4th 142, 148-149 . . . .) The trial court has no obligation to instruct on theories not supported, or only weakly supported by the evidence; however, 'instructions are required whenever evidence that the defendant is guilty only of the lesser offense is "substantial enough to merit consideration" by the jury. [Citations.]'" (*People v. Reeves* (2001) 91 Cal.App.4th 14, 51.)

Defendant contends that because the evidence was unclear whether the stolen bottles were still in the car when the struggle began, the jury could have believed that the struggle did not begin until after the bottles had been retrieved by a store employee, which would have supported a finding of attempted robbery but not a completed robbery.

As previously discussed, however, Almada testified that the bottles were still in the car when the struggle began. Moreover, Briggs substantially corroborated Almada's account. Accordingly, the record does not support a finding that neither force nor fear was used to retain the stolen property. In the absence of such evidence, the trial court had no obligation to instruct on attempted robbery.

III. The Instructional Error in Giving CALCRIM No. 361 Was Harmless

The trial court gave CALCRIM No. 361, which states: "If the defendant failed in (his) testimony to explain or deny evidence against (him) and if (he) could reasonably be expected to have done so based on what (he) knew, you may consider (his) failure to explain or deny in evaluating that evidence. Any such failure is not enough by itself to prove guilt. The People must still prove each element of the crime beyond a reasonable doubt. [¶] If the defendant failed to explain or deny, it is up to you to decide the meaning and importance of that failure."

"A claim of instructional error is subject to independent review by our court. [Citation.]" (*People v. Rodriguez* (2009) 170 Cal.App.4th 1062, 1066.) CALCRIM No. 361 is similar in content to CALJIC No. 2.62, which was approved in *People v. Saddler* (1979) 24 Cal.3d 671, 680-681. (*Rodriguez, supra,* at pp. 1066-1067.) The instruction cautions the jury that a defendant's failure to explain or deny is not enough by itself to prove guilt.

Defendant contends that CALCRIM No. 361 was not warranted because he was not asked to explain or deny incriminating evidence, and was not "asked any question that he did not answer straightforwardly, either in direct or cross examination. He never answered evasively." In response, the Attorney General contends that CALCRIM No. 361 was warranted by defendant's failure "to explain how all of the relevant witnesses, including his own, testified he elbowed Almada, when he claimed he did not use them 'at all.'" We conclude that defendant is correct.

Defendant's categorical denial of elbowing Almada created a conflict in the evidence rather than a justification for giving the instruction. "A contradiction between

the defendant's testimony and other witnesses' testimony does not constitute a failure to deny which justifies giving the instruction. (*Ibid.*) '[T]he test for giving the instruction is not whether the defendant's testimony is believable. CALJIC No. 2.62 is unwarranted when a defendant explains or denies matters within his or her knowledge, no matter how improbable that explanation may appear.' (*People v. Kondor* (1988) 200 Cal.App.3d 52, 57.)" (*People v. Lamer* (2003) 110 Cal.App.4th 1463, 1469 (*Lamer*).)

We find no facts or evidence in the prosecution's case and within defendant's knowledge that he did not explain or deny. Defendant's failure to explain why other witnesses had lied does not compel us to conclude that the instruction was warranted. If defendant had attempted to explain why Almada and other witnesses "would lie, such testimony would likely have been deemed speculative and therefore, inadmissible. (See *Gherman v. Colburn* (1977) 72 Cal.App.3d 544, 572 ['A witness may not speculate regarding the state of mind of another person absent proper evidence of such state of mind such as declarations or conduct'].)" (*Lamer, supra*, 110 Cal.App.4th at p. 1470, fn. omitted.) We therefore conclude that CALCRIM No. 361 should not have been given in this case.

Applying the *Watson* harmless error standard (see *Lamer, supra*, 110 Cal.App.4th at p. 1471; *People v. Watson* (1956) 46 Cal.2d 818, 836), we next consider whether giving CALCRIM No. 361 was prejudicial. Defendant argues the instruction improperly suggested to the jury that he "had been evasive in his testimony when he was not. It is reasonably probable that the jury would have believed some or all of appellant's explanations if they had not been erroneously invited in effect to consider his testimony with greater skepticism than that of other witnesses." We are not persuaded.

According to *Lamer*, "courts have routinely found that the improper giving of CALJIC No. 2.62 constitutes harmless error." (*Lamer, supra,* 110 Cal.App.4th at p. 1472.) "One reason courts have found the improper giving of CALJIC No. 2.62 to be harmless is that the text of the instruction itself tells the jury that it would be *unreasonable* to draw an adverse inference if the defendant lacks the knowledge needed to explain or deny the evidence against him. As the court in *People v. Ballard* (1991) 1

Cal.App.4th 752, 756, noted: 'CALJIC No. 2.62 does not direct the jury to draw an adverse inference. It applies only if the jury finds that the defendant failed to explain or deny evidence. It contains other portions favorable to the defense (suggesting when it would be unreasonable to draw the inference; and cautioning that the failure to deny or explain evidence does not create a presumption of guilt, or by itself warrant an inference of guilt, nor relieve the prosecution of the burden of proving every essential element of the crime beyond a reasonable doubt).' In addition, courts have noted that the fact that juries are instructed, pursuant to CALJIC No. 17.31, to 'disregard any instruction which applies to a state of facts which you determine does not exist,' also mitigates any prejudicial effect related to the improper giving of CALJIC No. 2.62. (*Saddler*, *supra*, 24 Cal.3d at p. 684.)" (*Lamer, supra,* 110 Cal.App.4th at p. 1472.)

In this case, the jury received CALCRIM No. 200, which is similar to CALJIC No. 17.31. It stated: "Some of these instructions may not apply, depending on your findings about the facts of the case. Do not assume just because I give a particular instruction that I am suggesting anything about the facts. After you have decided what the facts are, follow the instructions that do apply to the facts as you find them."

We conclude that in light of the overwhelming evidence that defendant was elbowing and pushing Almada, who emerged from the car with red marks on his neck and chest, and given that CALCRIM No. 200 was also provided to the jury, it is not reasonably probable that a result more favorable to defendant would have resulted if CALCRIM No. 361 had not been given. We therefore conclude that the instructional error was harmless.

IV. The Theft Conviction Must Be Reversed

Defendant contends that because theft is a lesser included offense of robbery, he could not be convicted of both theft and robbery. The Attorney General agrees.

"A defendant cannot be convicted both of the greater offense and the lesser included offense. [Citations.] Where there is sufficient evidence to sustain the conviction of the greater offense, the conviction of the lesser offense must be reversed.

[Citation.]" (*People v. Estes, supra,* 147 Cal.App.3d at p. 28.) In light of our determination that the robbery conviction is supported by substantial evidence, it necessarily follows that the theft conviction must be reversed.

DISPOSITION

The conviction on count 3, petty theft with a prior, is reversed. The case is remanded to the trial court with directions to prepare an amended abstract of judgment, which is to be forwarded to the Department of Corrections and Rehabilitation. In all other respects, the judgment is affirmed.

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SUZUKAWA, J.

We concur:

EPSTEIN, P. J.

MANELLA, J.